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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/919,469	07/31/2001	David G. Sasuga	Sasuga	3474

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EXAMINER

PARSLEY, DAVID J

ART UNIT

PAPER NUMBER

3643

DATE MAILED: 11/05/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

SK

Office Action Summary

Application No.

09/919,469

Applicant(s)

SASUGA, DAVID G.

Examiner

David J Parsley

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-15 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-15 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

PETER M. POON
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 3600

PMP

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on ____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. ____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). ____
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) ____ 6) ☐ Other: ____

Detailed Action

Amendment

1. This office action is in response to applicant's amendment (paper no. 7) dated 8-5-02 and this office action is final.

Claim Rejections - 35 USC § 102

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1 and 3 are rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Patent No. 4,057,932 to Spencer.

Referring to claim 1 Spencer discloses a method of packaging seedlings for distribution to and use by consumers, the method comprising: providing a tray – 51 and 52 including a bottom surface having a periphery and sidewall portions extending upwardly from the periphery and terminating in an upper edge surface and the tray having a predetermined height dimension extending from the bottom surface to the upper edge surface, and the bottom surface and the sidewall portions defining a continuous medium-receiving space – see figures 7-10. Spencer further discloses growing plants on a growing medium to a seedling stage and placing the medium in the space in the tray – 51 and 52 – see column 9 lines 24-68 and column 10 lines 1-68

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and column 11 lines 1-68. Spencer further discloses distributing the tray – 51 and 52 with the medium placed in the tray and the plants growing on the medium, for sale to a consumer while the plants are still in the seedling stage – see column 4 lines 40-55. Spencer further discloses the height dimension being such that a top surface of the growing medium is closely adjacent to the upper edge surface when the medium is placed in the tray to allow easy snipping of the stems without removing the medium from the tray – 51 and 52 – see column 9 lines 42-59 and see figures 7-10 and column 10 lines 42-68 and column 11 lines 1-64, which shows that the seedling is accessible and the user can manipulated the seedling in any way which includes snipping the seedling if desired.

. Referring to claim 3, Spencer discloses wherein growing the plants to the seedling stage comprises growing the plants from seed for at least about four weeks – see column 10 lines 31-57.

Claim Rejections - 35 USC § 103

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 2 is rejected under 35 U.S.C. 103(a) as being unpatentable over Spencer as applied to claim 1 above, and further in view of U.S. Patent No. 5,382,270 to Graham et al. Spencer does not disclose wherein the plants are culinary herbs. Graham et al. does disclose the plants are

culinary herbs – see column 8 lines 7-22. Therefore it would have been obvious to one of ordinary skill in the art to take the method of packaging seedlings for distribution of Spencer and add the plants being culinary herbs, so as to make the method more profitable for the user in that the culinary herbs could be sold to consumers who like to cook and restaurants to make a profit.

Claims 4-11 and 14-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Spencer in view of U.S. Patent No. 4,790,105 to Wareing et al.

Referring to claim 4, Spencer discloses a method of packaging seedlings for distribution to and use by consumers, the method comprising: providing a container – 50 including a top portion and a bottom portion, the container – 50 having a closed position in which the top portion and the bottom portion meet at an interface – 53 and 54 – see figures 7-10. Spencer further discloses growing plants on a growing medium to a seedling stage and placing the medium in the bottom portion of the container – 50 – see column 9 lines 24-68 and column 10 lines 1-68. Spencer further discloses closing the container – 50 with the medium in the bottom portion into the closed position – see column 9 lines 24-68 and column 10 lines 1-68. Spencer further discloses distributing the closed container for sale to a consumer while the plants are still in the seedling stage – see column 4 lines 40-55, and Spencer further discloses the bottom portion having a height dimension such that a top surface of the growing medium is closely adjacent to the interface – 53 and 54 when the medium is placed in the bottom portion, and the top portion having a height dimension such that when the container – 50 is in the closed position and the medium is in the bottom portion with the plants in the seedling stage extending upwardly therefrom, the plants are freely received in and protected by the top portion – see column 9 lines 24-68 and column 10 lines 1-68. Spencer does not disclose the top portion of the container

having a top wall. Wareing et al. does disclose the top portion of the container having a top wall – 10. Therefore it would have been obvious to one of ordinary skill in the art to take the method of packaging seedlings of Spencer and add the container with a top wall of Wareing et al., so as to provide protection to the seedlings to keep them away from any outside influences that may harm the seedlings.

Referring to claim 5, Spencer as modified by Wareing et al. further discloses wherein the top portion and the bottom portion are hingedly connected – 62 and 63 to each other along a side portion of the interface – 53 and 54 – see figures 7-10 of Spencer.

Referring to claims 6-7, Spencer as modified by Wareing et al. further discloses wherein the container – 50 includes a latch – 57-60 opposite the side portion of the interface – 53 and 54 to releasably secure the container – 50 in the closed position, and closing the container – 50 includes engaging the latch – 57-60 – see figures 7-10 and column 8 lines 1-17 of Spencer.

Referring to claim 8, Spencer as modified by Wareing et al. further discloses providing the container – 50 with venting to allow the plants to have access to fresh air when the plants are in the container – 50 and the container – 50 is in the closed position – see figure 10 of Spencer which shows the open end at reference numerals 53 and 54 and also at 64 which allows for venting (note: the addition of the vent at item – 64 is necessitated by the new limitation in the amendment being the top wall to cover the top portion of the container that is added to parent claim 4).

Referring to claim 9, Spencer as modified by Wareing et al. further discloses wherein providing the container – 50 with venting comprises leaving at least one gap between the top portion and the bottom portion when the container- 50 is in the closed position – see figure 10 of

Spencer where four gaps are shown at the location of reference numerals 53 and 54 and also at 64 (note: the addition of the vent at item – 64 is necessitated by the amendment in that the top wall to cover the top portion of the container is added to parent claim 4).

Referring to claims 10-11, Spencer as modified by Wareing et al. further discloses wherein the container – 50 has an open position in which, when the medium is in the bottom portion with the plants in the seedling stage extending upwardly from the medium, the plants are easily accessible to a user to allow stem portions of the plants to be snipped – see figures 7-10 and column 10 lines 42-68 and column 11 lines 1-64 of Spencer, which shows that the seedling is accessible and the user can manipulated the seedling in any way.

Referring to claim 14, Spencer as modified by Wareing et al. further discloses the medium – 15 is placed in the bottom portion – 2 after the plants have been grown to the seedling stage – 13 – see column 5 lines 27-37 of Wareing et al. Therefore it would have been obvious to one of ordinary skill in the art to take the method of packaging seedlings for distribution of Spencer as modified by Wareing et al. and include that the step of growing the seedlings comes before placing the seedlings in the container of Wareing et al., so as to make the container cheaper and thus make the method cheaper in that the container can be made to house a seedling only and does not have to include any additional design features to water or further grow the seedling.

Referring to claim 15, Spencer as modified by Wareing et al. further discloses wherein growing the plants to the seedling stage comprises growing the plants from seed for at least about four weeks – see column 10 lines 31-57 of Spencer.

Claim 12 is rejected under 35 U.S.C. 103(a) as being unpatentable over Spencer as modified by Wareing et al. as applied to claim 4 above, and further in view of U.S. Patent No. 5,382,270 to Graham et al. Spencer as modified by Wareing et al. does not disclose wherein the plants are culinary herbs. Graham et al. does disclose the plants are culinary herbs – see column 8 lines 7-22. Therefore it would have been obvious to one of ordinary skill in the art to take the method of packaging seedlings for distribution of Spencer as modified by Wareing et al. and add the plants being culinary herbs, so as to make the method more profitable for the user in that the culinary herbs could be sold to consumers who like to cook and restaurants to make a profit.

Claim 13 is rejected under 35 U.S.C. 103(a) as being unpatentable over Spencer as modified by Wareing et al. as applied to claim 4 above, and further in view of U.S. Patent No. 4,742,644 to Groth et al. Spencer as modified by Wareing et al. does not disclose providing a plurality of the containers and providing the top wall of the top portion and the bottom wall of the bottom portion of each container with complementary portions to facilitate stacking of the containers and inhibit accidental tipping of a stack of the containers. Groth et al. does disclose providing a plurality of the containers – 12,14, and 16 and providing the top wall – 18 of the top portion and the bottom wall of the bottom portion of each containers – 12,14, and 16 with complementary portions to facilitate stacking of the containers and inhibit accidental tipping of a stack of the containers – see figures 1-4 in particular figure 4. Therefore it would have been obvious to one of ordinary skill in the art to take the method of packaging seedlings for distribution of Spencer and add the plurality of stackable containers of Groth et al., so as to make the method more efficient and profitable in that more plants can be shipped since more

containers are used thus making the shipping of the plants quicker and thus meaning more plants can be sold which makes the method more profitable.

Response to Arguments

4. Regarding claim 1, applicant states the Spencer reference does not disclose edible seedlings. Spencer does not specifically state the seedlings are edible however it is inherent that any type of seedling including edible seedlings can be used with the device of Spencer since Spencer does not limit the invention to any particular plant or tree species and since the device of Spencer as seen in figures 7-10 can be used in conjunction with any type of seedling including edible seedlings. Further it is inherent that seedlings of plants and trees are edible to herbivores such as deer, which are known to eat foliage including seedlings. Therefore even though the Spencer reference discloses the seedlings are used for reforestation, the seedlings are still edible to herbivores such as deer and thus it is inherent that the seedlings are edible.

Further applicant states the Spencer reference does not disclose placing a multiple number of plants in one medium receiving space. As seen in figures 7 and 9 of Spencer the tray contains a continuous medium receiving space between the sidewalls and bottom wall when the tray is in the open condition. As seen in columns 10-11 the growing medium can be placed in the medium receiving space while the tray is in the open condition. Therefore the Spencer discloses multiple plants in one continuous medium receiving space since as seen in figures 7-10 more than one plant-receiving receptacle is shown when the tray is in the closed position.

Further applicant states the Spencer reference does not disclose growing seedlings for distribution and sale to a consumer. Spencer does disclose growing the seedlings for distribution and sale to a consumer as seen in column 4 lines 43-53.

Further applicant states that the Spencer reference does not meet applicant's definition for the term seedling being "a stage of development in which both the stems and leaves of the plants remain soft." As seen in applicant's specification page 9 lines 18-27 the applicant states "... the growing period to the seedling stage is typically about four weeks or longer." As seen in the Spencer reference at column 2 lines 9-30 the seedling is 4 to 8 weeks old. Thus the Spencer reference meets applicant's requirements for the age of the seedling and as seen above it is inherent that the Spencer reference discloses soft leaves and stems since seedlings are eaten by herbivores, which eat soft plants and foliage. Therefore the Spencer reference meets applicant's definition of the term seedling.

Regarding claim 4, applicant states the Spencer reference does not disclose the plants are freely received as defined by applicant in the container. However as seen in figures 7-10 of Spencer the plants are shown to be received into the top portion without undue crowding and without the tops of the plants being damaged by the top of the container. Spencer does not disclose a top wall but the combination of the Spencer and Wareing et al. references does disclose a container with a top wall and as seen in figure 2 of Wareing et al. the top wall does not damage the plants.

Further applicant states the Spencer reference does not disclose packaging edible seedlings for distribution to and used by consumers and distributing the containers for sale to a

consumer while the plants are still in the seedling stage. As seen above in reference to claim 1 the Spencer reference does disclose these features.

Regarding claim 5, as seen in figures 7-10 of Spencer the interface is the connection along the sides of items 53 and 54 and a side portion of the interface can either be along the top, bottom, left, or right side of the interface and as seen in figures 7-10 of Spencer the bottom side of the interface at items 53 and 54 contains the hinge at 62 and 63. Therefore Spencer discloses the invention as claimed in claim 5.

Regarding claims 6-7, the Meriam-Webster's Collegiate Dictionary defines latch as "any of various devices in which mating mechanical parts engage to fasten but usually not to lock something." As seen in figures 7-10 of Spencer the latches at the top portions of items 53 and 54 are mating mechanical parts to fasten the two halves of the container and latch releasably secures the container in that the container can be latched into the closed position as seen in figure 10 and unlatched into the open position as seen in figure 7.

Regarding claims 8-9, as seen in figures 7-10 of Spencer the container is vented with the top portion of the container having openings or vents in the top of the container when the container is in the closed position as seen in figure 10. Applicant states that the cover or top wall was not addressed in the initial office action in regards to the vents, which is because no top wall or cover was claimed. Now that the new limitations of the top wall are claimed in applicant's amended claim 4 the Spencer reference does show venting at item 64 which would not be hindered by the newly claimed top wall as shown in the combination of the Spencer and Wareing et al. references. Further even with the inclusion of the top wall as seen in the combination of the Spencer and Wareing et al. references the top wall is removable in Wareing et al. to allow access

to the plants and thus this would allow for the container as disclosed in the combination of the Spencer and Wareing et al. references to be vented at the top of the container after the removal of the top wall.

Regarding claims 10-11, applicant states the Spencer reference does disclose the plants are accessible. Therefore it is inherent that any procedures to modify the plants can be made easily allowing one to manipulate the seedling in any way. Further the applicant states the snipping of the stem would defeat the purpose of the plant transplantation that Spencer discloses. However the applicant claims only portions of the stem are snipped and not the entire plant and thus the plant can still be in condition for transplanting if only a small portion of the stem is snipped causing minimal damage to the plant.

Regarding claims 2 and 12, the motivation to combine the Spencer and Spencer as modified by Wareing et al. methods with the Graham et al. reference are shown above. Both the Spencer and Graham et al. reference disclose containers for growing plants and the Spencer reference does not limit the invention to any particular plant species. Therefore it would be obvious to one of ordinary skill in the art to combine the Spencer and Spencer as modified by Wareing et al. references with the Graham et al. reference.

Regarding claim 13, Groth et al. shows a top wall – 18 and a bottom wall – 82 as seen in figure 4 which meets the new claim limitations of the amended claim 13.

Regarding claim 14, the motivation for the combination of the Spencer and Wareing et al. references is stated above. The applicant states the Wareing et al. reference teaches away from and conflicts with the Spencer reference in that the Wareing et al. device allows for the plant roots to intermingle. However as seen above in reference to claim 1, the Spencer reference does

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disclose plants in a continuous medium receiving space and therefore the combination of the Spencer and Wareing et al. references is deemed to be proper. Further as seen in columns 10-11 of Spencer the seedlings can be placed in the container after they have been grown to the seedling stage. Therefore the combination of the Spencer and Wareing et al. references renders this claim obvious.

Conclusion

5. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

6. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

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The following patents are cited to further show the state of the art with respect to packaging of seedlings in general:

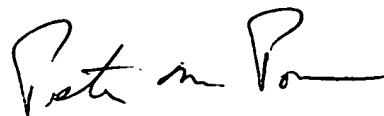
U.S. Pat. No. 4,916,857 to Kinghorn – shows seedling container with top wall

U.S. Pat. No. 5,970,653 to Liang et al. – shows seedlings are edible to herbivores such as deer – see column 1 lines 19-28

U.S. Pat. No. 6,378,246 to DeFoor – shows seedlings are edible to rodents – see column 1 lines 33-50

7. Any inquiry concerning this communication from the examiner should be directed to David Parsley whose telephone number is (703) 306-0552. The examiner can normally be reached on Monday-Friday from 7:30 am to 5:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Peter Poon, can be reached at (703) 308-2574.



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